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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 KAVIN W. MCCOY,) Civil No. 11-0653-MMA(WVG)
12)
13) Petitioner,)
14) ORDER DENYING MOTION FOR
15) APPOINTMENT OF COUNSEL
16) (DOC. # 24)
17)
18) ANTHONY HEDGPETH,)
19)
20) Respondent.)
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17 On May 27, 2011, Petitioner filed a document entitled "In re
18 3:11-cv-00653-MMA-WVG and Discrepancies in Documents in Documents #
19 14 #16." (Doc. #24) In that document, Petitioner requests that an
20 attorney be appointed for him. Therefore, the Court construes the
21 document to be a Motion for Appointment of Counsel.

22 The Sixth Amendment right to counsel does not extend to
23 federal habeas corpus actions by state prisoners. McCleskey v.
24 Zant, 499 U.S. 467, 495 (1991); Chaney v. Lewis, 801 F.2d 1191,
25 1196 (9th Cir. 1986); Knaubert v. Goldsmith, 791 F.2d 722, 728 (9th
26 Cir. 1986). However, financially eligible habeas petitioners seeking
27 relief pursuant to 28 U.S.C. § 2254 may obtain representation
28 whenever the court "determines that the interests of justice so

1 require.'" 18 U.S.C. § 3006A(a)(2)(B) (West Supp. 1995); Terrovona
 2 v. Kincheloe, 912 F.2d 1176, 1181 (9th Cir. 1990); Bashor v. Risley,
 3 730 F.2d 1228, 1234 (9th Cir. 1984); Hoggard v. Purkett, 29 F.3d
 4 469, 471 (8th Cir. 1994).

5 The interests of justice require appointment of counsel when
 6 the court conducts an evidentiary hearing on the petition.
 7 Terrovona, 912 F.2d at 1177; Knaubert, 791 F.2d at 728; Abdullah v.
 8 Norris, 18 F.3d 571, 573 (8th Cir. 1994); Rule 8(c), 28 U.S.C. foll.
 9 § 2254. The appointment of counsel is discretionary when no
 10 evidentiary hearing is necessary. Terrovona, 912 F.2d at 1177;
 11 Knaubert, 791 F.2d at 728; Abdullah, 18 F.3d at 573.

12 In the Ninth Circuit, "[i]ndigent state prisoners applying
 13 for habeas relief are not entitled to appointed counsel unless the
 14 circumstances of a particular case indicate that appointed counsel
 15 is necessary to prevent due process violations." Chaney, 801 F.2d
 16 at 1196; Knaubert, 791 F.2d at 728-29. A due process violation may
 17 occur in the absence of counsel if the issues involved are too
 18 complex for the petitioner. In addition, the appointment of counsel
 19 may be necessary if the petitioner has such limited education that
 20 he or she is incapable of presenting his or her claims. Hawkins v.
 21 Bennett, 423 F.2d 948, 950 (8th Cir. 1970).

22 In the Eighth Circuit, "[t]o determine whether appointment of
 23 counsel is required for habeas petitioners with non-frivolous
 24 claims, a district court should consider the legal complexity of the
 25 case, the factual complexity of the case, the petitioner's ability
 26 to investigate and present his claim, and any other relevant
 27 factors." Abdullah v. Norris, 18 F.3d at 573 (citing Battle v.
 28 Armontrout, 902 F.2d 701, 702 (8th Cir. 1990)); Hoggard, 29 F.3d at

1 471; Boyd v. Goose, 4 F.3d 669, 671 (8th Cir. 1993); Smith v.
2 Goose, 998 F.2d 1439, 1442 (8th Cir. 1993); Johnson v. Williams,
3 788 F.2d 1319, 1322-23 (8th Cir. 1986).

4 Since these factors are useful in determining whether due
5 process requires the appointment of counsel, they are considered to
6 the extent possible based on the record before the Court. Here,
7 Petitioner has sufficiently represented himself to date. From the
8 face of the Petition, filed *pro se*, it appears that Petitioner has
9 a good grasp of this case and the legal issues involved. Under such
10 circumstances, a district court does not abuse its discretion in
11 denying a state prisoner's request for appointment of counsel as it
12 is simply not warranted by the interests of justice. See LaMere v.
13 Risley, 827 F.2d 622, 626 (9th Cir. 1987). At this stage of the
14 proceedings, the Court finds that the interests of justice do not
15 require the appointment of counsel. Therefore, Petitioner's Motion
16 for Appointment of Counsel in this regard is DENIED without
17 prejudice.

18 Also, Petitioner seeks counsel because he states that he
19 needs an expert to use forensic laboratory reports pertaining to his
20 case. However, Petitioner has not shown that such appointment is
21 necessary. The *in forma pauperis* statute, 28 U.S.C. § 1915, does not
22 waive the requirement of the payment of fees or expenses for
23 witnesses.^{1/} Dixon v. Ylst, 990 F.2d 478, 480 (9th Cir. 1993).
24 Further, the appointment of an independent expert witness under
25 Federal Rule of Evidence 706 is discretionary. See Walker v.
26 American Home Shield Long Term Disability Plan, 180 F.3d 1065, 1071

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28 ^{1/} On April 21, 2011, Petitioner's Motion to Proceed *in forma pauperis*
was granted.

(9th Cir. 1999). "Reasonably construed, [Rule 706] does not contemplate the appointment of, and compensation for, an expert to aid one of the parties." Trimble v. City of Phoenix Police Dept., 2006 WL 778697, *2 (D. Ariz. 2006). Appointment of an expert witness may generally be appropriate when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or decide a fact in issue..." Levi v. Director of Corrections, 2006 WL 845733, *1 (E.D. Cal. 2006) [citing Ledford v. Sullivan, 105 F.3d 354, 358-59 (7th Cir. 1997)]. Therefore, Petitioner's Motion for Appointment of Counsel in this regard is DENIED without prejudice.

The Court also notes that "[w]here the issues involved can be properly resolved on the basis of the state court record, a district court does not abuse its discretion in denying a request for court-appointed counsel." Hoggard, 29 F.3d at 471; McCann v. Armontrout, 973 F.2d 655, 661 (8th Cir. 1992); Travis v. Lockhart, 787 F.2d 409, 411 (8th Cir. 1986) (per curiam) (holding that district court did not abuse its discretion in denying § 2254 habeas petitioner's motion for appointment of counsel where allegations were properly resolved on basis of state court record). At this stage of the proceedings, it appears the Court will be able to properly resolve the issues involved on the basis of the state court record.

"The procedures employed by the federal courts are highly protective of a pro se petitioner's rights. The district court is required to construe a pro se petition more liberally than it would construe a petition drafted by counsel." Knaubert, 791 F.2d at 729 (citing Haines v. Kerner, 404 U.S. 519, 520 (1972) (holding pro se complaint to less stringent standard) (per curiam)); Bashor, 730

1 F.2d at 1234. The Petition in this case was pleaded sufficiently to
2 warrant this Court's order directing Respondent to file an answer or
3 other responsive pleading to the Petition.

4 "The district court must scrutinize the state court record
5 independently to determine whether the state court procedures and
6 findings were sufficient." Knaubert, 791 F.2d at 729; Richmond v.
7 Ricketts, 774 F.2d 957, 961 (9th Cir.1985); Rhinehart v. Gunn, 598
8 F.2d 557, 558 (9th Cir.1979) (per curiam); Turner v. Chavez, 586
9 F.2d 111, 112 (9th Cir.1978) (per curiam). Even when the district
10 court accepts a state court's factual findings, it must render an
11 independent legal conclusion regarding the legality of a peti-
12 tioner's incarceration. Miller v. Fenton, 474 U.S. 104, 112
13 (1985). The district court's legal conclusion, moreover, will
14 receive de novo appellate review. Hayes v. Kincheloe, 784 F.2d
15 1434, 1436 (9th Cir. 1986).

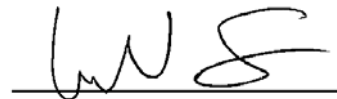
16 The assistance counsel provides is valuable. "An attorney
17 may narrow the issues and elicit relevant information from his or
18 her client. An attorney may highlight the record and present to the
19 court a reasoned analysis of the controlling law." Knaubert, 791
20 F.2d at 729. However, as the court in Knaubert noted: "unless an
21 evidentiary hearing is held, an attorney's skill in developing and
22 presenting new evidence is largely superfluous; the district court
23 is entitled to rely on the state court record alone." Id. (citing
24 Sumner v. Mata, 449 U.S. 539, 545-57 (1981), and 28 U.S.C.
25 § 2254(d)). Because this Court denies Petitioner's motion for
26 appointment of counsel, it must "review the record and render an
27 independent legal conclusion." Id. Moreover, because the Court
28 does not appoint counsel, it must "inform itself of the relevant

1 law. Therefore, the additional assistance provided by attorneys,
2 while significant, is not compelling." Id.

3 If an evidentiary hearing is required, Rule 8(c) of the Rules
4 Governing Section 2254 Cases requires that counsel be appointed to
5 a petitioner who qualifies under 18 U.S.C. § 3006A(a)(2)(B). Rule
6 8(c), 28 U.S.C. foll. § 2254; see Wood v. Wainwright, 597 F.2d 1054
7 (5th Cir. 1979). In addition, the Court may appoint counsel for the
8 effective utilization of any discovery process. Rule 6(a), 28 U.S.C.
9 foll. § 2254. For the above-stated reasons, the "interests of
10 justice" in this matter do not compel the appointment of counsel.
11 Accordingly, Petitioner's Motion for Appointment of Counsel is
12 **DENIED** without prejudice.

13 IT IS SO ORDERED.

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15 DATED: June 6, 2011

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18 Hon. William V. Gallo
19 U.S. Magistrate Judge
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